**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF NEW YORK**
**(Binghamton)**

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| **MOHAMMAD ALI DASHTI**,<br><br>*Petitioner*,<br><br>v.<br><br>**BRITTANY ELIZABETH LONG,**<br><br>*Respondent*. | Case No. 3:24-cv-903<br><br>Judge David N. Hurd<br><br>Magistrate Judge Miroslav Lovric |

**RESPONDENT BRITTANY ELIZABETH LONG'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(1) AND 12(B)(6)**

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## INTRODUCTION

Petitioner filed this case under the Convention on the Civil Aspects of International Child Abduction, specifically by and through The Hague on October 25, 1980 and the International Child Abduction Remedies Act, 22 U.S.C. 9001 *et seq.* (herein the "Hague"). (ECF No. 1). In short, Petitioner claims that Long, the mother of the minor child ("minor/ATD"), wrongfully removed and abducted ATD from Greece when she traveled with ATD in January 2024 from Athens to Vestal, New York, where Long and ATD have habitually resided continuously since December 2022. *Id*. Petitioner's conclusory narrative is inaccurate, implausible, and directly contradicted by the factual allegations of his own Petition. Dismissal is warranted.

The minor is a U.S. citizen. ATD's habitual residence is the United States. A few weeks' holiday trip to Greece does not establish habitual residence in Greece as that trip was temporary and transitory. This is supported not only by the Petitioner's own allegations, but by and through documents that support the allegations in the Petition. Petitioner failed to attach these documents in an effort to avoid the truth of the matter, *i.e.* that the five-year-old at issue was born a U.S. citizen and his habitual residence has been the United States since at least December 2022. There is no justifiable basis to order ATD to go to a country in which ATD has no immigration status and no current school, medical, or therapeutic connections, and where his father faces pending criminal charges that may impact his own ability to remain in Greece as a foreign refugee. ATD's habitual residence lies in the United States and this case is therefore not subject to the Hague Convention. Moreover, Petitioner failed to plausibly plead his Hague claim, inclusive of ATD's alleged habitual residence of Greece. Accordingly, this Court should dismiss Petitioner's claims for lack of jurisdiction or, in the alternative, failure to state a viable claim.

## BACKGROUND AND SUMMARY OF PETITIONER'S ALLEGATIONS

On July 20, 2024, Petitioner lodged a two-count Petition in this Court, claiming wrongful removal of ATD from Greece and asking this Court to take the extraordinary measure of ordering a five-year-old autistic child, who lives, goes to school, and receives critical support services in New York, to leave his home and move to Greece. (ECF No. 1, Verified Petition). In addition, Petitioner seeks various provisional and emergency remedies, along with attorneys' fees and costs. *Id.*

According to the Petition, the minor was born abroad in Greece in 2019 to mother, Long, an American citizen, and to father, Petitioner, an Iranian citizen purportedly living in Greece. (*Id.*, ¶¶ 2-4, 15). ATD is an American citizen with no other recognized or known citizenships, as he is not entitled to Greek citizenship under Petitioner's status. (*Id.*). In order to fly to the United States when he was a baby, and since he was born while his mother was abroad, ATD was required to obtain a United States passport, which was granted, by and through the State Department in January 2020 when the minor was an infant. **Exhibit A**, Minor's Passport.[1] After being born while Long was temporarily in Greece, ATD flew home to the United States in March 2020, residing here and splitting time as a baby and toddler between New York and Florida. (ECF No. 1, ¶ 16). Long and ATD later returned to Europe, spending time in Greece, among other countries, while Long continued certain work and travel following the COVID-19 Pandemic. (*Id.*, ¶ 17). Following time in the Netherlands and Germany, Long and ATD returned to the United States, with Petitioner's consent, to reside permanently in New York. In the meantime, Petitioner returned to Greece. (*Id.*, ¶¶ 21-23). Since December 2022, Long and ATD have continuously,

[1] **Exhibit A-C** are not included in the Memorandum ECF filing due to the sensitivity and privacy concerns of such documents. Respondent, out of an abundance of caution, has filed a motion to file these exhibits under seal and has submitted copies in camera to the Court.

systematically, and habitually resided in New York. (*Id.*, ¶ 25). Long and ATD briefly left the United States for two weeks from the end of December 2023 to the beginning of January 2024 for a short holiday trip to visit Greece over Christmas break. (*Id.*, ¶¶ 25, 27). That trip was supposed to last for under three weeks and in fact concluded with Long and ATD returning to New York in January 2024. (*Id.*)

In January 2024, Petitioner was arrested after holding Long and ATD against their will in his apartment, having confiscated and refused to give back ATD's passport. **Exhibit B**, Police Report.[2] The police report states that Long's residence was in Vestal, New York and that the minor was living with Respondent in New York. (*Id.*). According to the police report, Petitioner was charged with (1) "illegally detaining" Long and ATD, and (2) illegal possession of "addictive substances;" Petitioner was also caught in wrongful possession of ATD's United States passport. (*Id.*). After this terrifying incident, Long and ATD returned back to their home and habitual residence in Vestal, New York in January 2024. (ECF No. 1, ¶¶ 32, 37). For the purposes of this Petition, Petitioner claims that January 2024 was the minor's date of removal and alleged abduction from Greece. (*Id.,* ¶ 32).

In April 2024, Long filed an action against Petitioner in the Family Court of the State of New York, County of Broome following Petitioner's arrest and actions over the 2023 Christmas

[2] Courts may consider documents incorporated in a petition by reference, even if not attached, or information contained in the motion if plaintiff has knowledge or possession of the material and relief upon it in framing the petition. *Eaves v. Designs for Fin., Inc.,* 785 F. Supp. 2d 229, 244 (S.D.N.Y. 2011). Courts may also consider public disclosure of documents required by law and facts of which judicial notice may properly be taken under Federal Rule of Evidence 201. *Id.* Last, "a district court may also consider a document that is not incorporated by reference, where the petition '"relies heavily upon its terms and effect," thereby rendering the document "integral" to the complaint.'" *Fleisher v. Phoenix Life Ins. Co.*, 858 F. Supp. 2d 290, 294 (S.D.N.Y. 2012) (quoting *Rogers v. Blacksmith Brands, Inc.*, No. 11-CV-1940, 2011 WL 6293764, at *4 (S.D.N.Y. Dec. 13, 2011) (citation omitted).

holiday. (*Id*. ¶¶ 33, 45); **Exhibit C**, New York Family Court Petition. In her state court petition, Long indicated that ATD has been in a stable environment in Vestal, New York since December 2022, where he receives occupational therapy, physical therapy and schooling for his disability. (*Id*.). Yet, Petitioner now claims Greece is ATD's habitual residence, even though the minor is a U.S. citizen, residing in New York since 2022 and has his habitual status (*i.e.,* medical, schooling, etc.) in the United States. (ECF No. 1, ¶¶ 32, 37); *cf.* **Ex. C**.

Furthermore, while the Petition contains conclusory allegations of child abduction, it fails to provide any specificity as to how Greece can be ATD's habitual residence after only a brief vacation there that resulted in Petitioner's imprisonment of Respondent and ADT in an effort to prevent them from returning to their home in New York. This is especially apparent given ATD's legal status as a U.S. citizen and his ongoing habitual residency in New York since at least December 2022. The Petition also fails to identify dates or specific activities, alleged medical services, the address or city of the child's purported Greek residence, to support the elements of his Hague claim, all of which amounts to insufficient pleadings under Federal Rule of Civil Procedure 12(b)(6). (ECF No. 1, ¶¶ 51-58).

## LEGAL STANDARD

### A. Federal Rule of Civil Procedure 12(b)(1)

A case should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) "when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000). The task of the court is to determine whether the plaintiff has standing to sue. *Carter v. HealthPort Techs., LLC,* 822 F.3d 47, 56 (2d Cir. 2016). When deciding a Rule 12(b)(1) motion, the Supreme Court "makes clear that district courts have broad discretion when determining how to consider challenges to subject matter jurisdiction." *Harty v. West Point Realty, Inc.,* 28 F.4th 435 (2d Cir. 2021) (citing *Gibbs v. Buck*, 307 U.S. 66,

71-72 (1939) (collecting cases)). Moreover, the Second Circuit recognizes that district courts have "considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction." *APWU v. Potter*, 343 F.3d 619, 627 (2d Cir. 2003). Indeed, courts have broad discretion to consider relevant and competent evidence on a 12(b)(1) motion that raises factual issues. *See, e.g.*, 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (3d ed. 2021).

**B. Federal Rule of Civil Procedure 12(b)(6)**

A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss should be granted where a plaintiff fails to plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007) ("*Twombly*"). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("*Iqbal*") (quoting *Twombly*, at 555). "Nor does a Petition suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, at 557). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" will not suffice. *Id.* (citing *Twombly*, at 555).

While considering a Rule 12(b)(6) motions, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft* at 678. A pleading that only contains "labels and conclusions" or merely a "formulaic recitation of the elements" is not enough to overcome a 12(b)(6) motion and should be dismissed. *Twombly* at 555.

## ARGUMENT

### A. THIS PETITION SHOULD BE DISMISSED BECAUSE THE COURT LACKS SUBJECT-MATTER JURISDICTION.

Respondent is entitled to dismissal on Petitioner's Hague claim because the allegations and evidence support that ATD's habitual residence is the United States, not Greece. As there is no claim for this Court to address, the Court lacks subject-matter jurisdiction.

The Hague Convention is a multilateral treaty that governs the wrongful removal and retention of children from their country of habitual residence. 22 U.S.C. § 9001(a). A parent seeking the return of a child through a Hague petition must establish: (1) the child was "habitually residing" in one state and was removed to a different state, both which recognize one another as having accession to the Hague; (2) the removal was in breach of the petitioner's custody rights under the law of the state; and (3) the petitioner was exercising those rights at the time of the removal. *Gitter v. Gitter,* 396 F.3d 124, 130-31 (2d. Cir. 2005) (citing 42 U.S.C. § 11603(e)(1)(A)). To be subject to the treaty, a contracting state must opt-in and participate. Convention, art. 37-38. Proceedings for the return of the child must be brought within one year "from the date of wrongful removal" and return of the child is the primary remedy. Convention, art. 12; *Abbott v. Abbott*, 560 U.S. 1, 9 (2010).

A child's residence in a country can only be classified as "habitual" when "[their] residence there is more than transitory." *Monasky v. Taglieri*, 589 U.S. 68, 76 (2020). Habitual means "customary and usual," while transitory means temporary and not persistent.[3] *Id*. Determining a child's habitual residence is fact-driven and therefore courts must be "informed by common sense." *Id*. at 78. Where there is no colorable dispute as to a child's country of habitual residence and the

[3] *See* Merriam-Webster definition of transitory: https://www.merriam-webster.com/dictionary/transitory (last accessed September 3, 2024).

child has returned to that country, any Hague claim is moot. *In re Mahmoud*, No. 96-CV-4165, 1997 U.S. Dist. LEXIS 2158, at *2 (E.D.N.Y. Jan. 24, 1997); *Burton v. Oyekan*, No. 95-CV-5849, 1996 U.S. Dist. LEXIS, at *1 (S.D.N.Y. Oct. 1, 1996).

In order to have standing to bring a Hague claim, Petitioner must allege and prove that ATD's habitual residence is Greece. However, per Petitioner's own allegations, it clearly was not. ATD is a U.S. citizen who has habitually resided in New York, not Greece, since at least December 2022. According to the Petition, ATD has always been a U.S. citizen and has never been a Greek citizen. (ECF No. 1, ¶ 4). Petitioner himself is not a citizen of Greece and is only there on a temporary basis as a refugee. (*Id.* ¶ 2). ATD obtained a U.S. passport in 2020. **Ex. A**. ATD has been living in the United States, specifically Vestal, New York, with his mother, Long, for over 20-months where he receives therapy and schooling for his disability. (ECF No. 1, ¶¶ 20, 22-23); **Ex. C**. Over the last two calendar years, Long and ATD only visited Greece for a few weeks from December 2023 to January 2024, and that trip was only that long because Petitioner held ATD and Respondent against their will. Long and ATD eventually were freed by the Greek police in collaboration with the U.S. Embassy and returned home to the United States in January 2024, where ATD remains today. **Ex. B**, **(**ECF No. 1, ¶¶ 25-27).

In evaluating the 12-months prior to the date of the purported wrongful removal (*i.e.,* January 2023 to January 2024), there can be no dispute that the United States is and always was ATD's habitual residence. All of ATD's activities of daily living such as eating, sleeping, bathing, learning, medical care, schooling and the like have occurred within the United States for the entirety of 2023 and 2024, but-for the few weeks he went to visit his father in December 2023/January 2024, during Christmas break. (ECF No. 1, ¶¶ 25, 27); **Ex. B**. ATD should not be forced to leave his home in New York, the only home this five-year-old special needs child knows,

and return to a tenuous place that he has only temporarily visited in the past two years and to where he was subjected to wrongful detention and illegal drugs, all while his father has pending criminal charges and serious concerns of deportation back to Iran due to criminal violations affecting his refugee status.[4] **Ex. B**. For these reasons, Greece is not ATD's habitual residence.

Even if the Court looks outside the 12-month span (from January 2023 to January 2024), the Petitioner's facts and allegations, as well as logic and common sense, indicate that the child's habitual residence is not Greece. ATD is not a Greek citizen and has no right to permanently live there or stay on an extended basis. (ECF No. 1, ¶ 4). Specifically, *jus soli* citizenship is not an option as ATD was not born to a parent of Greek nationality.[5] ATD's home has always been in the United States, as he is a U.S. citizen with a U.S. passport with no ties to Greece. *Id.,* **Ex. A, C**. The Petitioner alleges that ATD spent time in "Europe", the Netherlands, and Germany in addition to Greece, of course cherry-picking Greece for purposes of his Petition. **(**ECF No. 1, ¶¶ 21-22). What Petitioner ignores is that no matter what countries ATD visited, ATD always returned to the United States, *i.e.* his home and habitual residence and the country from which ATD's passport is issued. A visit to a foreign county, *i.e.* Greece, does not give a person the right to live there nor does it unilaterally change that person's habitual residence. Deporting a U.S. citizen, who is a minor under a disability, to Greece is completely inappropriate and disproportionate to the purpose of the Hague. What Petitioner seeks is absurd, derogates the Hague, and would completely uproot ATD's life that he has become accustomed to for over 20-

[4] *See* **Exhibit D**, the Ministry of Migration and Asylum on 14.02.2022 (the "**Circular**"), Article 14, 3(a), Article 19, (2) of Law 4636/2019. This statute is in the native language, however the last page has been translated to English, as applicable to the relevant clause.

[5] *See* UNHRC Website: Greece, https://help.unhcr.org/greece/rights-and-duties/rights-and-duties-of-refugees/ (last accessed September 6, 2024).

months, inclusive of the specialized healthcare that he desperately needs. (ECF No. 1 ¶ 20); **Ex. C**. Therefore, given that ATD's habitual residence is in the United States and the child is here, the Petition is moot and ripe for jurisdictional dismissal.

Additionally, this Court lacks jurisdiction for another reason. Petitioner is an Iranian who lacks Article III standing to bring a Hague claim since Iran is not a party to the Hague. In order to bring a claim under the Hague, a petitioner must have standing to asserts rights under a country whose accession the United States has recognized. *Marks v. Hochhauser*, 876 F.3d 416, 422-24 (2d Cir. 2017) (affirming dismissal because Hague did not apply); *Aboud v. Mauas*, 216 Fed. Appx. 133, 134-35 (2d Cir. 2007) (affirming dismissal for lack of jurisdiction). To-date, there are 80 countries that are Hague treaty partners with the United States; Iran is not one of them.[6] Dismissal, therefore, is appropriate.[7] *Chvanova v. Chvanova*, 8:23-cv-00867-FWS-KES, 2023 WL 6457787 at *5-6 (C.D. Cal. Oct. 3, 2023) (dismissing Hague claim for lack of jurisdiction); *In re Mohsen*, 715 F. Supp. 1063, 1065 (D. Wyo. 1989) (same); *cf. De Silva v. Pitts*, 481 F.3d 1279 (10th Cir. 2007) (affirming denial of request to order return of child to Canada where petitioner was a refugee residing in Canada, a state party to the Hague, but petitioner's citizenship remained in Sri Lanka, a state not subject to Hague).

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[6] *See* U.S. Hague Convention Treaty Partners, 1980 Hague Convention on the Civil Aspects of International Child Abduction, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/hague-abduction-country-list.html (last accessed September 6, 2024).

[7] Refugees are not entitled to the full benefits of Greek citizenship; their refugee status lasts three years and subsequently expires if they do not reapply. *See* UNHRC Website: Greece, https://help.unhcr.org/greece/rights-and-duties/rights-and-duties-of-refugees/ (last accessed September 6, 2024). Only after seven years of residing in Greece *may* a refugee apply for citizenship, subject to good standing with the law. *Id.* Because Petitioner is an Iranian citizen with at best temporary status in Greece, and currently has pending a criminal action in that country which calls into question his right to even remain in Greece, he does not have standing to bring a Hague claim.

**B. THIS PETITION SHOULD BE DISMISSED BECAUSE THE PETITIONER FAILED TO PLEAD A PLAUSIBLE CLAIM.**

Respondent alternatively is entitled to dismissal because Petitioner failed to plausibly plead the three elements of his claim: habitual residency, breach of his custody rights, and exercising of said custody rights.

In order to properly plead, and ultimately prove a Hague claim, a petitioner must plead facts to support (1) the child was "habitually residing" in one state and was removed to a different state, both which recognize one another as having accession to the Hague; (2) the removal was in breach of the petitioner's custody rights under the law of the state; and (3) the petitioner was exercising those rights at the time of the removal. *Gitter,* 396 F.3d at 130-31 (2d. Cir. 2005) (citing 42 U.S.C. § 11603(e)(1)(A)). Pleadings that only contain "labels and conclusions" are not enough to state a claim and are subject to a 12(b)(6) dismissal. *Twombly,* 550 U.S. 544, 555 (2007). To adequately plead habitual residence, the pleader must identify facts to support usual and customary residence, as habitual residency is an inherently fact-driven inquiry. *Monasky v. Taglieri*, 589 U.S. 68, 88 (2020).

Here, Petitioner's Hague claim falls short of the facts necessary to support his claim; he merely states conclusions. To begin regarding the first element of his clam, habitual residence, Petitioner claims, "… ATD [is] fully integrated into Athens, Greece community," but fails to identify how this is true if ATD had been living in New York during the 12-month look back period. (ECF No. 1, ¶ 38). These vague and conclusory statements are rampant and widespread throughout Petitioner's Petition: "ATD receives routine medical care in Greece" (*Id*. ¶¶ 39, 56); fails to state when, where and for what purpose; "ATD understands and speaks basic Greek" (*Id*. ¶ 40); fails to state how the minor understands the language when he is under the age of five and

under significant disability (*Id.* ¶ 22[8]); how "The Father is fully involved in all the child's occupational and speech therapy…; provides the child's day-to-day care in Greece" (*Id.* ¶ 41); fails to state how the Petitioner is doing this if the minor has been residing in the U.S. since 2022 and all of 2023 and 2024; and fails to state when, where, or how "ATD participates in family and community activities in Greece" (*Id.* ¶¶ 53, 57). Not only are Petitioner's allegations missing the facts necessary to support his habitual residence element – his allegations are contradictory and vague.

With regard to the second element of Petitioner's Hague claim, Petitioner must plead that the removal was in breach of his custody rights under the law of the state, which in this case was in Greece. Yet, Petitioner's mere conclusions stating "Greek law" are not enough facts to plead this element. (ECF No. 1, ¶¶ 2, 64-65 (regurgitation of term "Greek law")). This is especially true because while Petitioner admits his not a Greek citizen, he fails to plead that he can exercise his custody rights in Greece, as a non-citizen of Greece (who, as a temporary refugee from Iran, does not enjoy all aspects of Greek law), upon a minor who has U.S. citizenship and in theory, also Iranian citizenship[9] with no legal ties to Greece. Petitioner alleges that Petitioner, Long, and ATD "vacationed" in the Netherlands and Germany and upon the conclusion of that "vacation", Long and ATD returned home to the United States and Petitioner traveled to Greece. (ECF No. 1, ¶¶

[8] *See* National Institute of Mental Health: "Autism Spectrum Disorder (ASM) is a neurological and developmental disorder that affects how people interact with others, communicate, learn and behave," https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd#:~:text=Autism%20spectrum%20disorder%20(ASD)%20is,first%202%20years%20of%20life. (last accessed September 6, 2024).

[9] *See* Cornell Law School, Iran Civil Code. https://www.law.cornell.edu/women-and-justice/resource/civil_code_of_iran_(citizenship)#:~:text=Article%20976%20states%20that%20children,child's%20father%20is%20not%20Iranian. Under Iranian Civil Code, "Article 976 states that a person is considered to be Iranian status if that person was born outside of Iran with whose fathers are Iranian (last assessed September 6, 2024).

21-23). A knowing parting of ways at the end of a European "vacation" is hardly the stuff of a wrongful removal or even surreptitious removal triggering the Hague. Ironically, the only citation Petitioner provides to "Greek law," is Article 1515 of the Greek Civil Code (*Id.* ¶ 63), which states: "parental care of a child under age born and existing outside a marriage of its parents belongs to the mother" – who in this case solely applies to Respondent, not Petitioner. **Exhibit E**, Greek Civil Code. Regardless, of his own reliance upon Article 1515 which completely undermines his alleged custody rights, Petitioner has not pleaded adequate facts to support the second element of his Hague claim. And even if Petitioner could plead enough facts to satisfy the second element of his claim, which he cannot, his facts contradict his ability to bring his claim. *Id.*

*Finally*, Petitioner must plead plausible facts sufficient to support the third element of his Hague claim – exercising his custody rights at the time of the removal. For the same reasons Petitioner failed to adequately plead the second element of his Hague claim, the third element has also been insufficiently plead. Basically, Petitioner fails to state what, *if any*, custody rights he had to ATD in January 2024, under his status as a non-citizen of Greece, upon a minor with U.S. citizenship who along with his mother was visiting his father in Greece for a few weeks over Christmas break or how Petitioner was exercising those custody rights, *e.g.* being arrested for wrongful detention hardly establishes a lawful exercise of custody rights. *E.g., Gitter,* 396 F.3d at 130-31; *De Silva,* 481 F.3d at 1285. Again, his conclusory allegation of "rights of custody" is not enough to factually plead his claim. (ECF No. 1, ¶¶ 62, 65, 67-71 (paragraphs all state "rights of custody" without any definition and facts to support)). Because Petitioner has simply recited the basic elements of a Hague claim without more, Petitioner's Hague claim fails and should be dismissed.

## CONCLUSION

For the reasons stated above, Respondent Brittany Elizabeth Long respectfully requests that the Court grant her motion in its entirety, dismissing Petitioner Mohammad Ali Dashti's Petition.

Dated: September 6, 2024

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Tiffany E. Alberty, an attorney, certify that on September 6, 2024, I caused a true and correct copy of the foregoing document to be filed through the Court's CM/ECF System:

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